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No. 99-1211

In the

Supreme Court of the United States

BOSS CAPITAL, INC,

Petitioner,

vs.

CITY OF CASSELBERRY,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

Richard L. Wilson
3610 Dubsdread Circle
Orlando, Florida 32804
407.649.9225
Counsel of Record

40pp

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In the

Supreme Court of the United States
October Term, 1999

BOSS CAPITAL, INC.

Petitioner,

vs.

CITY OF CASSELBERRY,

Respondent.

Pursuant to Rule 15.8, Rules of the Supreme Court of the United States, Petitioner Boss Capital, Inc. files this Supplemental Brief to call the Court's attention to a new circuit court decision in conflict with several circuit court decisions on the issue of the meaning of prompt judicial review.

In its Petition for Writ of Certiorari, Boss Capital urged this Court to grant the Writ to resolve a growing conflict among the federal circuit courts over the requirement that an ordinance imposing a prior restraint must provide for prompt judicial review. As a new decision of the United States Court of Appeals for the Sixth Circuit shows, that conflict can only be resolved by this Court.

ARGUMENT

In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court held that whenever the government imposes a prior restraint on free speech, the restraint must include three procedural safeguards, to eliminate the risk that the restraint will become a tool of the censor:

> In *Freedman*, we determined that the following three procedural safeguards were necessary to ensure expeditious decisionmaking by the motion picture censorship board: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. *Freedman, supra*, at 58-60.
>
> *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990)

In its Petition, Boss Capital argued that there is a significant conflict among the circuit courts as to the meaning of the term "prompt judicial review."[1] That conflict may have

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1. As the Ninth Circuit succinctly put it, in *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 11-14-15 (9th Cir. 1999): "There is some confusion associated with the meaning of the second *FW/PBS* safeguard, prompt judicial review, and this confusion has resulted in a split in the circuits."

had its genesis in the Seventh Circuit's decision in *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993)(en banc), *cert. denied*, 511 U.S. 1085 (1984).[2] But regardless of its source, the conflict grows daily, with the circuits so badly divided that only a resolution by this Court can resolve this matter of grave constitutional importance.

The First, Fifth, Seventh and Eleventh Circuits (and, arguably, the Second Circuit) have held that mere access to a judicial forum following the denial of a license is sufficient to comply with *Freedman's* requirement that any prior restraint must include a provision for prompt judicial review of the licensing authority's denial. *Jews for Jesus, Inc. v. Mass. Bay Trans. Authority*, 984 F.2d 1319 (1st Cir. 1993); *TK's Video, Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994); *Graff v. City of Chicago, supra*; *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999); *Beal v. Stern*, 184 F.3d 117 (2nd Cir. 1999).[3]

A second group of decisions, from the Fourth, Sixth and Ninth Circuits, holds that mere access to a judicial forum is insufficient. Those courts require a prompt judicial determination. *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988 (4th Cir. 1995)(en banc), *cert. denied*, 516

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2. Interestingly, there is a great division of opinion as to what *Graff* held – if anything – on the subject of prompt judicial review. *Compare, e.g., 1126 Baltimore Blvd.*, 58 F.3d 988 (4th Cir. 1995), *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998) and *Special Souvenirs, Inc. v. Town of Wayne*, 56 F. Supp. 2d 1062 (E.D. Wis. 1999).

3. The Second Circuit panel in *Beal* indicated in dictum that prompt judicial access might be sufficient. However, that was not a holding of the case.

U.S. 1010 (1995); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995); *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998).

A new decision of the United States Court of Appeals for the Sixth Circuit shows clearly why this Court must grant Boss Capital's Petition. In *Nightclubs, Inc. v. City of Paducah*, ___ F.3d ___ (6th Cir., Case No. 98-6581, February 2, 2000), the Sixth Circuit reviewed the denial of a preliminary injunction against enforcement of the adult entertainment business licensing ordinance of the City of Paducah, Kentucky. The trial court had ruled that the ordinance included the required procedural safeguards.

The Sixth Circuit considered only one issue: "The sole issue raised on appeal is whether Paducah's licensing scheme, on its face, contains adequate procedural safeguards as required by the First Amendment."[4] In a divided opinion, the panel determined that the ordinance was unconstitutional, in part because it merely provided prompt judicial access, and did not guarantee prompt judicial review through disposition.

In its decision the majority focused on the plurality and concurring opinions in *FW/PBS, Inc. v. City of Dallas, supra*, as well as the seminal case of *Freedman v. Maryland, supra*, to determine if the Paducah ordinance met the requirements of the First Amendment:

> Although the status of the third *Freedman* requirement remains unclear in the licensing context, this Circuit has previously noted that, under *FW/PBS,* at

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4. The Sixth Circuit opinion is reproduced as an Appendix to this Brief. The quoted statement is found at App. 7a.

> least the first two *Freedman* safeguards are essential for a licensing scheme to comport with the First Amendment. *See East Brooks Books*, 48 F.3d at 224 (invalidating Memphis, Tennessee sexually oriented business ordinance that failed to ensure prompt judicial review). Thus, a licensing scheme must remove standardless discretion from government officials and contain two procedural safeguards: (1) the decision whether to issue a license must be made within a specified brief period, and the status quo must be maintained during that period and during judicial review, and (2) there must be a "guarantee of prompt judicial review." *Id.* at 225.
>
> App. at 10a.

The majority then discussed the irreconcilable conflict among the circuits:

> Moreover, this Circuit and a number of other circuits have held that a licensing scheme must reasonably ensure a prompt judicial determination, and not mere access to judicial review. *See Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097, 1101 (9th Cir. 1998) ("'prompt judicial review' means the opportunity for a prompt hearing and a prompt decision by a judicial officer"); *11126 Baltimore Blvd., Inc. v. Prince George's County, Maryland*, 58 F.3d 988, 1000-01 (4th Cir.) (en banc), *cert. denied*, 516 U.S. 1010 (1995) (under

> *FW/PBS* and its progeny, prompt judicial determination is required); *East Brooks Books,* 48 F.3d at 225 (prompt judicial adjudication required). Although the First, Fifth, and Eleventh Circuits have concluded that "for licensing ordinances, prompt judicial review only means access to prompt judicial review," *Boss Capital, Inc. v. City of Casselberry,* 1999 WL 688046, slip op. at *4 (11th Cir. Sept. 3, 1999), this Court remains persuaded that Supreme Court precedent requires a sufficiently prompt determination on the merits.
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> App. at 15a - 16a.[5]

In a mirror image of the split among the circuits, there was a split among the Sixth Circuit panel! In a dissent, Judge Merritt also wrote about the conflict, deciding that the position taken by the Eleventh Circuit in *Boss Capital* was the correct application of *FW/PBS* and *Freedman*:

> The broad language of *FW/PBS* holds only that "the possibility of prompt judicial review or an avenue for prompt judicial review" is required. *See FW/PBS,* 493 U.S. at 228-29. While some language in Justice Brennan's concurring opinion indicating that a "prompt judicial determination" might be required has caused discussion among the Circuit courts, several Circuits

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5. The panel must not have felt that the Seventh Circuit decided the issue in *Graff.*

have agreed that "prompt judicial review" only means access to prompt judicial review. *See, e.g., Boss Capital, Inc. v. City of Casselberry,* 187 F.3d 1251 (11th Cir. 1999); *TK's Video, Inc. v. Denton County,* 24 F.3d 705 (5th Cir. 1994); *Graff v. City of Chicago,* 9 F.3d 1309 (7th Cir. 1993) (en banc); *Jews for Jesus, Inc. v. Mass. Bay Transp. Auth.,* 984 F.2d 1319 (1st Cir. 1993). In addition, the Second Circuit has intimated that it would follow this line of reasoning. *See, Beal v. Stern,* 184 F.3d 117 (2d Cir. 1999) (noting, without deciding, that prompt access to judicial review in state courts would satisfy the Freedman test). I do not believe the Court intended for a prompt judicial determination to be required in a situation where the city has provided for the broadest type of judicial review within its powers. To find otherwise is to invalidate broadly-worded city ordinances on the basis of the swiftness or slowness of that particular state's judicial procedures, a test that could force Circuits to come to seemingly arbitrary and inconsistent decisions based on the various procedures of the different state court systems within their reach. For these reasons, I do not believe *FW/PBS* requires the result the Court reaches here.

App. at 24a - 25a.

Thus, we have a conflict among the circuits, a conflict among the district courts,[6] and a division among panel members in the same case.[7] This Court must resolve the conflict.

CONCLUSION

As Boss Capital pointed out in its original Petition, this issue is of critical concern. While many of the cases considering the issue have arisen in the context of adult entertainment businesses, the federal courts are wrestling with the identical issue in core political speech cases. *Beal v. Stern, supra* is a challenge to an ordinance of the City of New York that requires a permit for core political speech in a public park, the traditional public forum. The Seventh Circuit heard oral argument in January, 2000 in a case involving permits for

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6. There are even conflicts within district courts. For instance, as Boss Capital noted in its Petition, one judge in the Middle District of Florida ruled that prompt access to the courts is all that is required. *Florida Video Xpress, Inc. v. Orange County*, 983 F.Supp. 1091 (M.D. Fla. 1997). A second judge ruled (prior to the decision in *Boss Capital*) that a prompt judicial determination is required. *Bledsoe v. City of Jacksonville Beach*, 20 F.Supp.2d 1317, 1326 (M.D. Fla. 1998).

Boss Capital noted in its Petition that district courts in circuits that have not decided this issue are left to their own determinations of *Freedman*'s requirements.

7. Arguably, there is a split among different panel decisions in the Eleventh Circuit. The earlier opinion in *Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1995), *cert. denied*, 514 U.S. 1066 (1995) seemed to indicate that the Eleventh Circuit required prompt judicial disposition. Other federal circuit read that decision as such. *See, e.g., Baby Tam & Co.* The *Boss Capital* panel reached the opposite conclusion, and said that *Redner* had not decided the issue.

political parades on city streets, another situation involving core political speech in a traditional public forum. *MacDonald v. City of Chicago*, Seventh Circuit Case No. 98-3836.[8] It has a second case before it on the same issue. *MacDonald v. Chicago Park District*, Seventh Circuit Case No. 99-1811.[9] The Second Circuit has also heard oral argument in a challenge to the New York City parade permit ordinance. *MacDonald v. Safir*, Second Circuit Case No. 99-7010.[10] The Eleventh Circuit is considering a case in which a challenge was brought against a public rally permit ordinance. *Cannabis Action Network, Inc. v. City of Gainesville*, Eleventh Circuit Case No. 98-2837.[11] Each case involves a permit for core political speech in a public forum. Each case involves the question of what constitutes prompt judicial review. Thus, the question does not only affect sexually explicit speech. It impacts on speech at the pinnacle of First Amendment protection.

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8. The unreported District Court's opinion in this case can be found at 1999 WL 102775.

9. The unreported District Court's opinion in this case can be found at 1999 WL 203288.

10. The District Court opinion in this case is reported as *MacDonald v. Safir*, 26 F.Supp.2d 664 (S.D. N.Y. 1998).

11. In this case, one district judge found, after a hearing on an application for preliminary injunction, that the plaintiffs had demonstrated a substantial likelihood of success on its claim that a permit ordinance for public rallies in a public park failed to provide for prompt judicial review. *Michel-Trapaga v. City of Gainesville*, 907 F. Supp. 1508 (N.D. Fla. 1995). The suit involved a facial challenge to the ordinance. Subsequently, on cross-motions for summary judgment, a second judge found that because the ordinance provided prompt access to the courts, it met the prompt judicial review requirement.

In a concurring opinion in *Graff v. City of Chicago, supra*, Judge Ripple wrote that the difficulty in correctly understanding and applying this Court's decision in *FW/PBS*, as that decision affected the requirement of procedural safeguards mandated by *Freedman*, should be resolved by this Court: ". . . [T]his case presents a most difficult problem for the court, a problem that, in the final analysis, can only be resolved by additional guidance from the Supreme Court of the United States." 9 F.3d at 1333. He added: "I respectfully suggest that this case is deserving of further review in the Supreme Court of the United States." *Id*, at 1335.[12]

Boss Capital asks this Court to issue its Writ of Certiorari, so that this critical question can be settled.

Richard L. Wilson
3610 Dubsdread Circle
Orlando, Florida 32804-3052
407.649.9225 (Fax) 423.8727

Attorney for Petitioner

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12. For whatever reason, this Court did not review the *Graff* decision. One can speculate that since there was no reasonable fear that the Chicago ordinance would lead to censorship, the result did not significantly implicate First Amendment concerns.